INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdiction	2
The statute involved	4
The issues and ruling below	4
The questions are substantial	9
Appendix "A"—Opinion of the District Court	20

Table of Cases Cited

Cinema Amusements, Inc. v. *Lowe's, Inc.*, 85 F. Supp. 319	12
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541	2
Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501	12, 17
Koster v. *Lumberman's Mutual Co.*, 330 U. S. 518	17
Standard Oil v. *United States*, 221 U. S. 1	18
United States v. *Briggs Manufacturing Co.*, 86 F. Supp. 178	11
United States v. *California Cooperative Canneries*, 279 U. S. 553	2
United States v. *E. I. du Pont de Nemours & Co.*, 83 F. Supp. 233	11
United States v. *Gerber*, 86 F. Supp. 175	11
United States v. *National City Lines*, 7 F.R.D. 393, 456, 334 U. S. 573, 337 U. S. 78	8, 9, 10, 12, 18
United States v. *Scott & Williams, Inc.*, C.C.H. Trade Reg. Rep. para. 62, 559 (S.D.N.Y.)	10

Statutes Cited

Act of Februarry 11, 1903, 32 Stat. 823, as amended by the Act of June 25, 1948, 62 Stat. 989, 15 U.S.C. 29	2
Act of June 25, 1948, 62 Stat. 937, 28 U.S.C. 1404a,	2, 4, 6, 8, 9

	Page
Clayton Act, Section 7	2, 4
Expediting Act, 15 U.S.C. 29	2, 4
Federal Rules of Criminal Procedure, Rule 21(b)	18
Holtzoff "Reform of Federal Criminal Procedure," 3 F.R.D. 445	18
Medalie "Federal Rules of Criminal Procedure," pp. 274-275	18
Sherman Act:	
Section 1	2, 4
Section 2	2, 4
United States Code:	
Title 15, Section 29	2, 4
Title 28, Section 1291	3, 4
Youngquist N.Y.U. School of Law, Institute Proceedings on Federal Rules of Criminal Procedure, 169,-170	18

POOR COPY

BLEED THROUGH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 49C 1071

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, UNITED STATES RUBBER COMPANY, CHRISTIANA SECURITIES COMPANY, DELAWARE REALTY & INVESTMENT CORPORATION, PIERRE S. DU PONT, LAMMOT DU PONT, AND IRENEE DU PONT,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, E. I. du Pont de Nemours & Company, *et al.*, defendants herein, file their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on a direct appeal to review the decision of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this cause January 26, 1950. A petition for

appeal is presented to the District Court herewith, to-wit, on March 21, 1950, within sixty days of the above-mentioned order as required by § 2101 of § 1 of the Act of June 25, 1948, 62 Stat. 961-962, 28 U. S. C. § 2101.

Jurisdiction

This appeal is prosecuted from an order of the United States District Court for the Northern District of Illinois, Eastern Division, denying appellants' motion to transfer this civil antitrust case, brought under §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act, to the District of Delaware under § 1404 (a) of § 1 of the Act of June 25, 1948, 62 Stat. 937, 28 U. S. C. § 1404 (a).

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by the Act of February 11, 1903, 32 Stat. 823, as amended by the Act of June 25, 1948, 62 Stat. 989, 15 U. S. C. § 29, which provides as follows:

> "In every civil action brought in any district court under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545-547; *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558.

The Expediting Act, 15 U. S. C. § 29, gives the Supreme Court exclusive appellate jurisdiction to review final judgments in antitrust actions brought by the United States. *United States* v. *California Cooperative Canneries, supra.* The order of the district court denying defendants' motion to transfer this antitrust action to the District of Dela-

POOR COPY

BLEED THROUGH

ware is a final judgment. *Cohen* v. *Beneficial Industrial Loan Corp., supra.*

The *Cohen* case held final and appealable an order of a federal district court denying the defendant's motion in a stockholder's derivative suit that the plaintiff be required to post security in accordance with a statute which made an unsuccessful plaintiff liable for the reasonable expenses of the defense of such a suit and entitled the corporate defendant to demand security for their payment. The Statute invoked in that case permitted appeals only from "final decision of the district court," 28 U. S. C. § 1291, and the Supreme Court observed at the outset that if Congress meant to allow "appeals only from those final judgments which terminate an action, this order would not be appealable." 337 U. S. at 545. But the Court held that Congress had not intended so restrictive a standard of appealability, and that the criterion of "finality" was intended to prevent appeals in the following circumstances: (1) The statute disallows appeal "from any decision which is tentative, informal or incomplete." The order of the district court refusing to apply the statute requiring security "was final in that sense before the appeal was taken." (2) The statute does not "permit appeal, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge." But under this test too the order was appealable, for it "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment." In fact when final judgment disposing of the entire case was entered it would "be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

Like the order in the *Cohen* case, the order in this case is "a final disposition of a claimed right which is not an

ingredient of the cause of action and does not require consideration with it." And like the right claimed in the *Cohen* case, the right to a transfer in this case is "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Furthermore, unless this order is reviewed now, the defendants' rights under the transfer statute will be irreparably lost, because effective review will be impossible after the trial has been held. The statute governing the appeal in this case, 15 U. S. C. § 29, differs in no material respect from the statute governing the appeal in the *Cohen* case, 28 U. S. C. § 1291. The order denying transfer is therefore final and appealable.

The Statute Involved

The statute under which the motion to transfer was made is § 1404 (a) of § 1 of the Act of June 25, 1948, 62 Stat. 937, 28 U. S. C. § 1404 (a), which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The Issues and Ruling Below

The United States has filed a complaint in the United States District Court for the Northern District of Illinois, charging that since 1915 the petitioners have been engaged in a continuing combination and conspiracy to restrain unreasonably interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. (June 30, 1949 No. 49 C 1071 Civil.) The defendants named are Pierre S., Lammot and Irenee du Pont, all of Wilmington, Delaware; Christiana Securities

POOR COPY

BLEED THROUGH

Company and Delaware Realty and Investment Corporation, whose sole offices are in Wilmington, Delaware; E. I. du Pont de Nemours & Company, whose administrative and executive headquarters are in Wilmington, Delaware; General Motors Corporation, a Delaware corporation with administrative and executive headquarters in Detroit, Michigan and New York, New York; United States Rubber Company, a New Jersey corporation, whose administrative and executive headquarters are in New York, New York. In addition the complaint names as defendants and asks relief against so-called "class defendants," who number in excess of 150; have interests, direct or indirect, in Christiana Securities Company, Delaware Realty and Investment Corporation, or United States Rubber Company; and are "members of the du Pont family," defined by the complaint as "lineal descendants of Pierre Samuel du Pont de Nemours, the senior member of the family, who emigrated to the United States from France, and the wives and husbands of such lineal descendants."

The complaint charges (1) that the du Pont family organized the defendants, Christiana Securities Company, and Delaware Realty & Investment Corporation, as a means of securing and perpetuating du Pont family control over the operations and policies of the du Pont Company; (2) that the du Pont Company acquired control of General Motors and exercised that control to bring about various illegal restraints which enhanced the size, power and market control of du Pont and General Motors at the expense of their competitors; (3) that the du Pont family acquired control of United States Rubber and exercised that control to bring about various illegal restraints which enhanced the size, power and market control of du Pont and U. S. Rubber at the expense of their competitors; (4) that Pierre S. du Pont, Lammot du Pont and Irenee du Pont, as officers and

directors of the du Pont Company and General Motors and as stockholders of U. S. Rubber, acted as representatives of the members of the du Pont family who profited from the continuing combination and conspiracy.

The prayer for relief asks that the du Pont Company, Pierre S. du Pont, Lammot du Pont, Irenee du Pont and the members of the du Pont family be required to dispose of all stock they hold, directly or indirectly, in General Motors or U. S. Rubber; that the du Pont Company and General Motors be required to divest themselves of their interests in certain manufacturing enterprises acquired jointly in alleged violation of law; that the du Pont Company, General Motors and U. S. Rubber be required to cancel all commercial contracts or agreements *inter se*.

All the defendants joined in a motion filed October 1, 1949, under the Act of June 25, 1948, 62 Stat. 937, 28 U.S.C. § 1404 (a), for an order transferring this action from the Northern District of Illinois to the District of Delaware, where it might have been brought, on the ground that such transfer would be for the convenience of parties and witnesses and in the interest of justice.

In support of this motion petitioners filed affidavits showing that:

(a) The three individual defendants, Pierre S., Lammot and Irenee du Pont, presently aged 80, 69 and 73 respectively, reside in the immediate vicinity of Wilmington, Delaware. There they have lived nearly their entire lives; there their entire business careers have been centered; and there all of their records will be found. They are alleged to have played the major role in the transactions challenged by the complaint and will, therefore, be required at advanced ages to participate actively in the preparation for and to be present and testify at the trial of this action.

POOR COPY

BLEED THROUGH

(b) 90% of the more than 150 members of the du Pont family who are named in the complaint and are threatened with serious divestiture reside in or near Wilmington, Delaware.

(c) The principal corporate defendant, the du Pont Company, and two of the other four corporate defendants have their principal places of business and their sole administrative and executive headquarters at Wilmington, Delaware.

(d) Neither General Motors nor U. S. Rubber, the remaining corporate defendants, has its principal place of business or executive headquarters in Chicago. Both General Motors and U. S. Rubber will depend heavily in the defense of this case upon records located and maintained at New York City and Wilmington, Delaware and witnesses residing in the immediate vicinity of New York City and Wilmington, Delaware and would, therefore, be more convenienced by trial in Delaware than in Chicago.

(e) The bulk of the voluminous files and records, both corporate and individual, covering a period of 35 years, which will be necessary in the trial of this action are located in Wilmington, Delaware.

(f) By far the majority of the individuals who played a part in or are familiar with the transactions challenged by the complaint and who will, therefore, be required to participate actively in the preparation for and to testify at the trial of this action reside in the East, and most of them in or near Wilmington, Delaware.

The United States resisted the defendants' motion to transfer this action to Delaware, showing by affidavit that:

(a) The investigation which preceded the filing of the complaint, including certain proceedings before a grand

jury, had been conducted by the Midwest office of the Antitrust Division of the Department of Justice at Chicago.

(b) The three manufacturing defendants, du Pont, General Motors and U. S. Rubber, do sufficient business in the Chicago area to meet the venue requirements in actions brought under the antitrust laws, and in addition do business on a nationwide basis and on a large scale.

(c) No single forum would be ideally convenient for all defendants, so plaintiff's choice of the Northern District of Illinois should not be disturbed.

(d) Relatively convenient and expeditious rail and air schedules are available between Chicago and Detroit, Wilmington and New York.

The United States argued that notwithstanding the Supreme Court's decision last term in *United States* v. *National City Lines*, 337 U. S. 78, the transfer provided by Congress in § 1404 (a) of the Judicial Code was not available to defendants operating on a nationwide basis and charged with violations of nationwide scope and impact, as they almost invariably are in antitrust actions.

On January 26, 1950, Judge Walter J. La Buy entered an order accompanied by a memorandum opinion denying the defendants' motion to transfer the action to the District of Delaware. The denial of the motion was based upon: (1) the court's conclusion that the transfer provided by 28 U.S.C. § 1404 (a) for the convenience of parties and witnesses and in the interest of justice is not available to defendants conducting nationwide businesses and charged with violations alleged to be nationwide in scope and impact; (2) the court's reliance, for its conclusion regarding convenience, upon the circumstance that the Government had investigated this case through a branch office of the Antitrust Division of the Department of Justice in the

POOR COPY

BLEED THROUGH

Northern District of Illinois; and (3) the Court's finding that trial in the District of Delaware would be less convenient for some of the parties and their witnesses than would trial in the Northern District of Illinois (*notwithstanding* the uncontroverted affidavits of the defendants concerning their convenience and that of their witnesses, and the failure of the plaintiff to make any allegations concerning the convenience of its witnesses or, apart from convenience of its counsel, its own convenience).

The Questions Are Substantial

Appellants contend that the denial of this motion to transfer constitutes serious error of law, as well as abuse of judicial discretion and abnegation of judicial duty, the practical effects of which are: (a) to circumvent the Supreme Court's decision in *United States* v. *National City Lines*, 337 U. S. 78; (b) to enable the United States to place venue in antitrust actions as it chooses without regard to the convenience of parties and witnesses contrary to the intention of Congress as expressed in § 1404 (a) of the Judicial Code; (c) to allow the district court to make findings that have no support in the pleadings or affidavits and in so doing to reject the parties' representations as to their convenience and that of their witnesses.

If the order of the district court stands, the Government will have succeeded in achieving by indirection a result which the Supreme Court deliberately refused to reach in the second *National City Lines* case, 337 U. S. 78. That case decided, contrary to the contention of the Government, that the transfer authorized in § 1404 (a) was available in actions brought under the antitrust laws. The order of the court below is inconsistent with that decision.

From the first *National City Lines* case, 334 U. S. 573, which held (before § 1404 (a) was enacted) that the doctrine

of *forum non conveniens* had no application to antitrust actions, the Government argued that it was not in the interest of justice to transfer,

> "It is not in the interest of justice to permit a change of forum where the defendants operate on a national basis and do substantial business in the forum of plaintiff's choice." Brief in Opposition in District Court, p. 32.

Ignoring the intervening enactment of § 1404 (a) and the Supreme Court's interpretation of that statute in the second *National City Lines* case, the district court observed in accepting the Government's contention,

> "The court is here confronted with the same dilemma referred to by the Supreme Court of the United States in the National City Lines case, 334 U. S. 573, 591, wherein the court stated that application of the doctrine of forum non conveniens is difficult where the violations charged are nationwide and the defendants are numerous companies widely scattered in location of their principal offices and places of carrying on business."

The Government expressly recognized that antitrust actions usually involve geographically scattered defendants and violations allegedly nationwide in scope. Therefore, "the interest of justice" standard in § 1404 (a) has been interpreted by the district court upon the urging of the Government to preclude the transfer of practically all antitrust actions—whatever may be the convenience of the parties and witnesses.[1]

---

[1] The circumvention of the Supreme Court's second *National City Lines* decision may be expected to continue so long as the decision of the district court stands as an example of judicial acceptance of the Government's argument. Already another district court, presumably on the urging of the Government, has taken precisely the same view. *United States v. Scott & Williams, Inc.*, C.C.H. Trade Reg. Rep. Para. 62, 559 (S.D. N.Y.).

POOR COPY

BLEED THROUGH

This decision is remarkable in that it denies the benefits of § 1404 (a) because of the size of the defendants and the scope of their business activities. Other decisions, including that of the Supreme Court in the second *National City Lines* case, have consistently recognized that transfer is open to every litigant and should be allowed whenever the lawsuit can more conveniently and expeditiously be tried at some place other than at the place the action was brought. See, *e. g.*, *United States* v. *E. I du Pont de Nemours & Co.*, 83 F. Supp. 233, 234 (D. D. C.); *United States* v. *Gerber*, 86 F. Supp. 175 (E. D. Pa.); *United States* v. *Briggs Manufacturing Co.*, 86 F. Supp. 178 (E. D. Pa.). The Supreme Court's decision in the second *National City Lines* case is the full answer to the Government's contention, accepted by the court below, that defendants doing business on a broad basis cannot qualify for transfer in a case charging nationwide violations. There the complaint charged a nationwide conspiracy to restrain and monopolize commerce in motor busses, petroleum supplies, tires and tubes through the acquisition of local transportation companies located in 42 cities in 16 states. Of the nine corporate defendants, two had their principal places of business in Illinois, three in California, and the others in Oklahoma, Michigan, Ohio, and New York, respectively. Seven of the nine were Delaware corporations, one was an Ohio corporation, and the other was a California corporation. The district court concluded that the action, though involving charges of violations that were nationwide in scope and defendants who were geographically scattered, should be transferred. The Supreme Court affirmed. If the interest of justice did not preclude a transfer in that case, it should not here.

To protect its decision in the second *National City Lines* case from impairment and to correct the inequitable interpretation of § 1404 (a), which would make transfer depend

upon the size of the defendant and the scope of his activities rather than convenience of trial, the Supreme Court should reverse the decision of the district court.

The district court's denial of the motion can rest upon but a single purported consideration of convenience in favor of trial of this action in Chicago, *viz.*, that lawyers employed in Chicago at the Midwest Office of the Antitrust Division of the Department of Justice had investigated this matter prior to the filing of the complaint.[2] At the very most this circumstance goes to convenience of counsel, and the transfer statute recognizes only convenience of "parties and witnesses." The district court, however, refused to be bound by the statute and relied heavily, as an element of trial convenience, upon the fact that the pre-complaint investigation was conducted in Chicago.[3] In the application of both the common law doctrine of *forum non conveniens* and the transfer remedy provided by § 1404 (a), the courts have recognized that counsel's convenience is not a factor of significance. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 509; *Cinema Amusements, Inc.* v. *Loew's, Inc.*, 85 F. Supp. 319, 325 (D. Del.). Moreover, the fact that a pre-complaint investigation was conducted by lawyers working out of the Chicago office does not determine where a lawsuit can be most conveniently tried. These same lawyers may or may not try the case. Already the lawyer who was the head of

---

[2] Compare the *National City Lines* cases, in which the pre-complaint investigation appears to have been conducted in the Southern District of California, from which the case was transferred to the Northern District of Illinois. *United States* v. *National City Lines*, 7 F.R.D. 393, 399 (S.D. Calif.).

[3] The reliance which the district court placed upon the pre-complaint investigation having been conducted in Chicago appears from the fact that the Judge buttressed the Government's plea of inconvenience with an allegation of hardship that the Government had not even made and could not have made, *viz.*, that "The entire personnel of the Chicago office would have to be transferred to Delaware."

POOR COPY

BLEED THROUGH

the Midwest Office during the entire pre-complaint investigation has been transferred to New York.

It would hardly be suggested that a private plaintiff could influence the determination of the convenient forum, let alone fix it, as the Government has done in this action, by directing that an investigation be carried out and a complaint prepared by attorneys situated at some place that has no connection whatsoever with the subject matter of the complaint. Just as § 1404 (a) applies to the large as well as the small defendant, it affords no special privileges to the Government as party plaintiff. If this order of the district court stands, the Antitrust Division is given the means of fixing the place of trial in all actions it brings without regard to the convenience of parties and witnesses—in complete derogation of the Supreme Court's decision in the second *National City Lines* case.

Within the District of Delaware all of the individual defendants reside, 90% of the 150 so-called class defendants reside, four of the five corporate defendants are incorporated and three of them have their principal places of business. The great bulk of the documentary proof vital to this lawsuit will be found in Delaware, and by far the majority of the essential witnesses reside there. The unanimous sworn representations on behalf of all defendants, which were not factually controverted by the Government, were that Delaware would be, for them and their prospective witnesses, a more convenient place of trial than Chicago.

This lawsuit has nothing to do with Chicago or people in Chicago. If a lawsuit can be said to have a situs, that of this lawsuit, clearly and unequivocally, is Wilmington, Delaware. The non-Wilmington defendants are involved solely because of their relations with the Wilmington defendants and because of the activities of the Wilmington defendants.

The Government did not allege that it had a single wit-

ness that would be convenienced by trial in Chicago. None of the documents pertinent to the trial of this case are in Chicago.[4] All the defendants urged the superior convenience of Wilmington over Chicago in respect to both witnesses and case of access to documentary proof. The three individual defendants and their records are of major importance, not only to their own defense, but to that of all defendants. Next most important to all defendants are the records of the du Pont Company, which is alleged to have dominated the other corporations, and the testimony of du Pont's officers and directors since 1915. The district court asserted in its opinion that "the Government states that there is no allegation that a single one of the directors [of the du Pont Company] or individual defendants would be called as a witness." The Government had not and could not have made such a statement as to the directors, for the affidavit of counsel for the du Pont Company stated that many of the former officers and directors of the du Pont Company would be called as witnesses. The Government had made such a statement as to the three individual defendants, but there were before the court at the time it entered the order refusing transfer supplementary affidavits of the individual defendants stating that they would testify. The district court therefore lacked any factual justification for ignoring the convenience of the three individual defendants and the other du Pont officers and directors who will appear as witnesses.

Obviously General Motors and U. S. Rubber will have to depend to some extent upon records in Detroit and New York, and witnesses who reside there, but they will also

---

[4] The weight to be given this consideration is not affected by the fact that the Government has photostats of certain documents selected from the defendants' files; for counsel for the defendants must have access to the files themselves during the trial of this case, and most of these files are in Wilmington; none are in Chicago.

POOR COPY

BLEED THROUGH

depend heavily *for the defense of this lawsuit* upon records and witnesses located in Wilmington. While Wilmington might not be more convenient than Detroit or New York for General Motors and U. S. Rubber, there can be no serious question that it is for them a far more convenient place of trial than Chicago. Counsel for General Motors made this clear at oral argument.[5] Chicago, so far as this law-

---

[5] Transcript of argument:

". . . as I understand Mr. Hotchkiss' argument, it is in part at least that a transfer to Wilmington would be unfair to General Motors and to U. S. Rubber that we should have requested New York or Detroit. He seems to either doubt our sincerity or our independence in going along with Wilmington . . . it was . . . necessary that we view the picture as a whole and determine where the greatest convenience of the whole group of defendants might be served, and that seems to be Wilmington.

"The burden of this case is the conduct of the du Pont defendants, both the company and the individuals. It is their conduct and it is their motive that have been questioned by this proceeding. Likewise, it is mainly against those defendants that the relief is requested. . .

• • • • • • •

"The other two defendants, Rubber and General Motors, undoubtedly will have considerable documentary evidence of their own, they undoubtedly will have many witnesses of their own, but because the suit involves the conduct of the du Pont individuals their testimony of necessity will be tied in with the testimony and the evidence of the du Pont defendants.

"Perhaps there isn't any forum that would be ideally convenient for U. S. Rubber. It will be dependent to a large extent on New York, also on the people in Wilmington.

"The same might be said of General Motors, it will be dependent to a large extent on its New York office and its New York personnel. During the period covered by the complaint in this case the principal executive offices of General Motors were in New York City for most of the time. The officials, who were the policymakers during this period, live in New York. They lived there then; they live there now. Their officials, their employees, their associates, are in New York City.

"Also General Motors has a part of its executive offices and many of its divisions directed from Detroit. So that perhaps no spot will be ideally convenient for General Motors; neither Detroit, nor New

suit is concerned, is just another city with no greater connection with the subject matter of the suit than Los Angeles, Boston or Houston.

Nevertheless, the district court concluded from "the overall picture presented"—not from the specific considerations of trial convenience—that transfer to Delaware would cause as much inconvenience to some of the parties and their witnesses as it would convenience others. This finding is plainly erroneous and totally without support in the pleadings or affidavits.

Trial convenience in the application of § 1404 (a) is not a question of doing business or being found in a particular place. Nor is it a question of which of the defendants is the largest in size. The issue is—where can the lawsuit be most conveniently and expeditiously tried? The facts that General Motors has an electromotive plant in the Chicago area and administrative headquarters in Detroit, circumstances emphasized by the Government, may determine venue but have no bearing on the questions of what forum would be *convenient for the trial of this lawsuit.* One needs only to scan the topical index of the complaint or the prayer for relief to appreciate beyond question that this lawsuit is directed against the du Ponts. The action is unique in Anglo-American jurisprudence. Certainly not since the Magna Charta have all the members of a family related by blood or marriage to a common ancestor, who has been dead for 135 years, been singled out for divestiture. True,

---

York, nor Wilmington, but relatively speaking, Wilmington is a convenient place for both Rubber and General Motors. New York is within two hours train time from Wilmington. General Motors and Rubber both have the benefit of their New York offices and the benefit of the Wilmington defense of this case accessible at Wilmington. And the comparison between the convenience of Wilmington to Rubber and to General Motors, compared with Chicago, is so outstanding that you might almost say that Wilmington seems to be ideally convenient even for those two defendants."

POOR COPY

BLEED THROUGH

two corporations, one located in New York and one in Detroit and New York, are also named as defendants—but only as and to the extent they have allegedly come under du Pont domination. The district court was entirely correct in prefacing its summary of the complaint as follows: "Briefly, the violations charged against the du Pont interests are. . . ." This single introduction encompassed the entire complaint.

The district court has been misled by the Government's efforts to avoid the plain implications of its own complaint. Petitioners do not question that the sound administration of § 1404 (a) requires that the district court be allowed ample latitude in its application. But plain and flagrant error must be corrected in order not only that justice be done these petitioners but that an erroneous precedent of general applicability be set aside. The transfer remedy should be one of substance and not one within the uncontrolled discretion of the district courts. The court should not be permitted to make any findings lacking semblance of support in the complaint, pleadings, or affidavits, and in so doing reject unanimous representations of the defendants firmly anchored in the complaint.

Place of trial is an element of real substance in the administration of the law. A series of procedural reforms that have taken place over the past several years show an increasing awareness on the part of courts and the bar that proper place of trial is of great importance in judicial administration. In *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 509, and *Koster* v. *Lumberman's Mutual Co.,* 330 U. S. 518 decided in 1947, the Supreme Court removed all doubt as to whether the doctrine of *forum non conveniens* was applicable in federal courts. The Federal Rules of Criminal Procedure, which became effective March 21, 1946, similarly recognized the importance of place of trial. Criminal Rule

21 (b) permitted transfer of a case involving an offense committed in two or more districts or divisions to another district or division if the court is satisfied that transfer is in the "interest of justice." Members of the Advisory Committee, which drafted these rules, have pointed out that one of the principal objectives of Rule 21 (b) is to preclude the Government from bringing antitrust actions in illogical places to the extreme inconvenience of the defendants. Youngquist, N. Y. U. School of law, Institute Proceedings on Federal Rules of Criminal Procedure 169-170 (1946); Medalie, *id.* at 274-275; Dession, The New Federal Rules of Criminal Procedure; II, 56 Yale L. J. 197, 224-225 (1947); Holtzoff, Reform of Federal Criminal Procedure, 3 F. R. D. 445, 452 (1944). For a short period the Government was able to continue this practice in civil actions even though the defendants could obtain removal of criminal cases under identical circumstances. Thus when the Government brought simultaneous criminal and civil antitrust actions against the same defendants in the Southern District of California, the transfer of the criminal case to the Northern District of Illinois (*United States* v. *National City Lines*, 7 F. R. D. 393) could not be disturbed, but the dismissal of the civil case on the ground of *forum non conveniens* (*United States* v. *National City Lines*, 7 F. R. D. 456) was reversed by the Supreme Court. *United States* v. *National City Lines*, 334 U. S. 573. The practical effect of § 1404 (a) was to extend to civil defendants at least the same transfer remedy available in criminal cases and, if anything, to broaden the standards for determining the applicability of the remedy, so as to add "the convenience of parties and witnesses" to "the interest of justice." In this perspective it is of some significance that a case heavily relied upon by the Government in resisting petitioners' request for a transfer to Delaware is *Standard Oil* v. *United States*, 221 U. S. 1. That

POOR COPY

BLEED THROUGH

case, of course, was brought long before any of the procedural reforms referred to above had become effective. There the Government required 71 corporations, most of whose main offices were in the East, to defend in the Eastern District of Missouri, where only one corporation was even "present." The case for years has been cited as the outstanding example of the extremes to which inconvenience to the defendants has been carried in antitrust actions. It Is now resurrected by the Government forty years later as precedent for requiring "the du Pont interests" to stand trial in Chicago.

The place of trial is of special significance in antitrust actions. The complaint in this case, for example, challenges in detail numerous transactions, even incidents, that have occurred since 1915. The trial will be necessarily lengthy and will require constant reference to files, records and persons familiar with the transactions. If trial can be held at the place where most of these records and persons are located, it will certainly conserve the time of the court as well as reduce the costs of litigation to both the Government and defendants and result in more efficient administration of the antitrust laws.

Respectfully submitted,

GERHART A. GESELL,
FERRIS E. HURD,
PAUL H. ARTHUR,
JOHN M. HARLAN,
AARON FINGER.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

49 C 1071

UNITED STATES OF AMERICA, Plaintiff

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, United States Rubber Company, Christiana Securities Company, Delaware Realty & Investment Corportation, Pierre S. du Pont, Lammot du Pont, and Irenee du Pont, Defendants

Memorandum

Defendants have filed a motion pursuant to Section 1404 (a) of the Judicial Code (28 U. S. C.) to transfer the above cause of action to the United States District Court for the District of Delaware. The complaint alleges defendants entered into a combination and conspiracy to restrain and monopolize interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. A.) and Section 7 of the Clayton Act (15 U. S. C. A. Sec. 18).

Briefly, the violations charged against the du Pont interests are (1) the creation in 1915 by members of the du Pont family of Christiana Securities and Delaware Realty as personal holding companies for the sole purpose of perpetuating family control over the du Pont company and its policies; causing the du Pont Company to acquire control of General Motors and United States Rubber; (2) agreeing to enhance the size, power and market control of du Pont Company, General Motors and United States Rubber at the expense of competitors; and (3) agreeing to utilize control of the du Pont Company, General Motors and United States Rubber in such a way as to eliminate competition among themselves.

It is agreed that venue is properly laid in the Northern District of Illinois since the venue section of the antitrust

POOR COPY

BLEED THROUGH

laws provides that suit against a corporation "may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transact business." (15 U. S. C. A., Sec. 22.)

Section 1404(a) of the Judicial Code provides as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Submission of the question of forum non conveniens is based upon the supporting and opposing affidavits of the parties. Three guides are set forth in the section (1) convenience of parties, (2) convenience of witnesses, and (3) interests of justice.

In opposing this motion the government alleges the investigation of defendants was initiated in its Midwest Office at Chicago, that the preliminary stages of the investigation were conducted from that office, the grand jury proceedings preceding the filing of the complaint were conducted in this district and division, the documents obtained as a result of the investigation are in Chicago, there is no office of the antitrust division in Wilmington, Delaware, and the entire personnel of the Chicago office would have to be transferred to Delaware. Other affidavits submitted by the government show listings in the Chicago telephone directory of several hundred offices, sales agencies, dealers, and suppliers, etc., as well as important manufacturing plants operated by some of the defendants in the Chicago area. Also submitted is an affidavit showing convenience of air and rail transportation and comparative travel time between Chicago and Detroit, Detroit and Wilmington, New York and Chicago, Wilmington and Chicago, for the transportation of records and witnesses.

Defendant, E. I. du Pont de Nemours and Company is a Delaware corporation with its principal place of business in Wilmington, Delaware. It is alleged to be the largest producer in the United States of explosives, powder and chemicals. The affidavit of its counsel and secretary assert that the great bulk of the records that will be essential to the de-

fense of this action are maintained in the normal course of business in Wilmington, Delaware.

Christiana Securities Company and Delaware Realty and Investment Corporation are Delaware corporations having their principal place of business in Wilmington, Delaware. These corporations are alleged to be personal holding companies for the sole purpose of perpetuating family control over the du Pont Company and its policies, and its members are alleged to have caused the du Pont Company to acquire control of General Motors and United States Rubber. It is pertinent to note that the affidavit of Willis L. Hotchkiss discloses that these two corporations employ jointly but two persons and the records of Christiana are contained in six filing drawers. This fact is not controverted by defendants.

The three individual defendants, Pierre S. du Pont, Lammot du Pont and Irenee du Pont and 90% of the members of the du Pont family reside in the vicinity of Wilmington, Delaware. The three defendant individuals and others are alleged to have created Christiana and Delaware Realty for the purpose of consolidating holdings in the du Pont Company, which controls General Motors, and are alleged to have, together with others, the controlling interest in United States Rubber.

General Motors Corporation is a Delaware corporation and has its administrative and executive offices in Detroit, Michigan and New York City. It is stated its Board of Directors and important committees meet in New York City. General Motors is alleged to be the largest manufacturing company in the United States. It is further alleged that General Motors serve as a profitable outlet for the du Pont Company products, that discoveries by General Motors in the chemical field, such as tetraethyl and refrigerants, were by agreement turned over to du Pont, that agreements were made between du Pont and General Motors which provided that suppliers to General Motors were required to buy materials from du Pont for their products, that through du Pont control General Motors gave United States Rubber a substantial portion of its business. The government's affidavit asserts, and it can be judicially noted, that General Motors' main center is Detroit, Michigan where the hub of its manu-

POOR COPY
BLEED THROUGH

facturing and merchandising activities is centered. It is evident, too, that material records pertaining to the issues involved in this cause are located in Detroit. In any event the records and witnesses would have to be transported either to Wilmington or Chicago and the court observes that Detroit is geographically nearer to Chicago than to Wilmington.

United States Rubber is a New Jersey corporation with its principal place of business located in New York City. United States Rubber is alleged to be the largest manufacturer of rubber products in the United States. It is alleged that after du Pont control preference was given to du Pont on products of United States Rubber and du Pont when purchasing United States Rubber products would purchase all or substantially all of the output. Its activities and its products are alleged to dovetail extensively into General Motors operations and products. Its records and witnesses would have to be transported either to Wilmington or Chicago.

It is to be noted the activities of the du Pont Company which allegedly violate the antitrust laws arise in its association with General Motors, with General Motors in other enterprises, in association with United States Rubber, and United States Rubber with General Motors.

Considering convenience of witnesses, the affidavits of defendants disclose on behalf of the du Pont Company that it may be necessary to call "upwards of 50 witnesses," most of these prospective witnesses being present or former officers or directors of the du Pont Company. The government states that there is no allegation that a single one of the directors or individual defendants would be called as a witness. No definite statement is made by any of the parties as to the number and residence of the witnesses to be called and at this stage of the proceedings the court recognizes that none can be made with any degree of accuracy. Therefore, with regard to convenience of witnesses, the court can only speculate whether Chicago or Wilmington will be more convenient for a majority of the witnesses who will be called to testify for the plaintiff and the defendants.

The court is here confronted with the same dilemma referred to by the Supreme Court of the United States in the

National City Lines case, 334 U. S. 573, 591, wherein the court stated that application of the doctrine of forum non conveniens is difficult where the violations charged are nationwide and the defendants are numerous companies widely scattered in location of their principal offices and places of carrying on business.

It is self-evident that whether this case is tried in the forum chosen by the government or at any of the principal places of business of any of the defendants, some of the parties will be inconvenienced. The choice of venue is to be determined by a preponderance of the facts and the burden is on the moving party. To attempt to resolve the niceties involved in balanceing the relative conveniences and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball; neither of which implements are available to this court.

The over-all picture presented leads the court to the conclusion that a transfer of this action from Chicago to Wilmington for trial would probably cause as much inconvenience to some of the parties and their witnesses as it would convenience others, and a transfer would not be in the interest of justice.

The motion for a transfer of this cause from the Northern District of Illinois to the District of Delaware under Section 1404(a) of the Judicial Code is hereby overruled. An order has this day been entered in accord herewith.

(Signed) Walter J. La Buy, Judge United States District Court.

Dated: January 26, 1950.

POOR COPY

BLEED THROUGH

In the United States District Court for the Northern District of Illinois, Eastern Division

---

CIVIL ACTION No. 49 C 1071

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, UNITED STATES RUBBER COMPANY, CHRISTIANA SECURITIES COMPANY, DELAWARE REALTY & INVESTMENT CORPORATION, PIERRE S. DU PONT, LAMMOT DU PONT, AND IRENEE DU PONT, DEFENDANTS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

This is an appeal from an order of the United States District Court for the Northern District of Illinois denying appellant's motion, made pursuant to 28 U. S. Code 1404 (a), to transfer the action, a civil proceeding charging violation of Sections 1 and 2 of the Sherman Act, to the District of Delaware.

Appellants predicate appellate jurisdiction upon Section 2 of the Expediting Act of February 11, 1903, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

MOTION TO DISMISS

The United States, pursuant to Rule 12, par. 3, of the Rules of the Supreme Court as amended, moves that the appeal be dismissed for the reasons that the order which has been appealed is not the "final" judgment in the cause and that appeal lies only from such a final judgment.

Section 2 of the Expediting Act, as amended, provides that in any action brought by the United States under the Sherman Act, "an appeal from the final judgment of the district court will lie only to the Supreme Court."[1] This Act bars appeal from an interlocutory judgment or order (*United States* v. *California Co-operative Canneries,* 279 U. S. 553, 558; *United States Alkali Export Association* v. *United States,* 325 U. S. 196, 201), and the district court's order denying appellants' motion to transfer the action to the District of Delaware obviously is interlocutory.

It has long been settled that an order transferring a cause to another court is not a final judgment and hence not appealable under statutes authorizing appeal from "final" judgments or decisions. *Railroad Company* v. *Wiswall,* 23 Wall. 507, 508; *In re Pennsylvania Company,* 137 U. S. 451, 453.

[1] The quoted language has remained unchanged since the enactment of the Expediting Act of 1903, except that Section 17 of the Act of June 25, 1948, substituted the word "judgment" for "decree."

POOR COPY

BLEED THROUGH

Section 1404 (a) of Title 28, United States Code, provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In the second and fourth circuits an order of transfer pursuant to Section 1404 (a) has been held to be interlocutory, and therefore not appealable (*Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4), *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 868–869 (C. A. 2), and we are aware of no contrary decision. The court in the former case pointed out the distinction between dismissal of a cause in application of the doctrine of *forum non conveniens*, which "puts an end to the action" and hence is appealable (cf. *United States* v. *National City Lines, Inc.*, 334 U. S. 537), and an order of transfer, which does not end the action "but preserves it as against the running of the statute of limitations and for all other purposes." 178 F. 2d, at p. 362.

A commentary of the highest authority with respect to Section 1404 (a) unequivocably states that grant or denial of a motion to transfer "is interlocutory and non-appealable." Moore, *Commentary on U. S. Judicial Code* (1949) 210.[2]

---

[2] In *Ex Parte Collett*, 337 U. S. 55, 68, the Court mentioned that Section 1404 (a) was "drafted in accordance with a

Under Rule 21 (b) of the Federal Rules of Criminal Procedure, which permits transfer of a criminal case under circumstances akin to those provided in Section 1404 (a) with respect to civil cases, an order denying transfer has been held to be interlocutory and therefore not a "final" decision appealable under 28 U. S. C. 1291. *Semel* v. *United States,* 158 F. 2d 231, 232 (C. A. 5).[3]

If the appeal in the present case is upheld, an appeal will lie from every order granting or denying transfer under Section 1404 (a) or Rule 21 of the Rules of Criminal Procedure. In cases coming within Section 2 of the Expediting Act the interlocutory order can be appealed to the Supreme Court, and in other cases to the appropriate court of appeals. Such right of appeal would impose a heavy additional burden on appellate courts, and it would open up wide vistas of delay.[4]

---

memorandum * * * from the author of Moore's Federal Practice," and the Court referred (n. 29, p. 69) to the interpretation which Professor Moore had placed on the Section after its enactment.

[3] The *Semel* case was referred to with apparent approval in *United States* v. *National City Lines, Inc.*, 334 U. S. 573, n. 43 at p. 594.

[4] For example, an appeal to the Supreme Court, even if disposed of by a *per curiam* affirmance, would usually result in a delay of some four months. Sixty days is allowed for taking an appeal and the appeal is ordinarily not docketed until 40 days after it is taken.

POOR COPY

BLEED THROUGH

Cohan v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, upon which appellants reply, does not support their appeal. The case was a stockholder's derivative action, with federal jurisdiction based on diversity of citizenship. A New Jersey statute made the plaintiff in such an action liable for expenses of defending the suit if the plaintiff did not prevail, and it required the plaintiff to post security for such liability. The district court ruled that this statute was not applicable to a federal proceeding. On appeal from this ruling, the court of appeals reversed and, on review by certiorari, this decision was affirmed.

The Court distinguished between the appeal there taken under 28 U. S. C. 1291, authorizing appeals from "all final decisions" of district courts and appeal under a statute permitting appeal only from "final judgments which terminate an action." The Court said (p. 545) that it was obvious that under a statute of the latter type the order of the district court "would not be appealable." The appeal allowed by the Expediting Act is of the latter type and thus not within the holding in the *Cohen* case. The Act permits appeal from "*the* final *judgment* of the district court." Congress, by this Act, "limited the right of review to an appeal from the decree which disposed of all matters (see *Collins* v. *Miller*, 252 U. S. 364); and it precluded the possibility of an appeal * * * from an interlocutory decree." *United*

States v. *California Co-operative Canneries*, 279 U. S. 553, 558.[5]

The Court in the *Cohen* case also distinguished (p. 547) between an appeal where the contested ruling was that the right asserted was without legal basis and an appeal attacking only "an exercise of discretion" in ruling upon the right asserted, i. e., the amount of security to be required. The Court said that in the latter situation "appealability would present a different question." The instant appeal involves such "different question" and the *Cohen* decision clearly is not controlling. Here, the district court regarded the motion to transfer as within the purview of Section 1404 (a). The appeal from its ruling challenges only "an exercise of discretion" in determining the issues as to "the convenience of parties and witnesses" and "the interest of justice" raised by the motion to transfer.

MOTION TO AFFIRM

The United States, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court as amended, moves that the order of the district

---

[5] In *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587, 593 (C. A. 2), certiorari denied 338 U. S. 894, rehearing denied 338 U. S. 940, the court, in passing upon the meaning of Section 5 of the Clayton Act, 15 U. S. C. 16, said:

"Thus the statute explicitly requires 'a final judgment or decree' and does not refer, for example, to a final decision—a point of contrast made recently in the Supreme Court with respect to appealable orders. Cohen v. Beneficial Industrial Loan Corp., 1949, 69 S. Ct. 1221."

POOR COPY

BLEED THROUGH

court denying appellants' motion to transfer be affirmed, for the reason that the appeal presents no substantial question.

The issue raised by the appeal is whether the district court acted arbitrarily or unreasonably in its ruling on the motion to transfer. Since Section 1404 (a) "was drafted in accordance with the doctrine forum non conveniens" (*Ex parte Collett*, 337 U. S. 55, 58), it is appropriate to consider the principles governing grant of relief under that doctrine.

"The doctrine leaves much to the discretion of the court to which plaintiff resorts" and "the combination and weight of factors requisite to" a particular conclusion in a particular case "are difficult to forecast or state." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508. The court will weigh relative advantages and obstacles to a fair trial, but "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Ibid.*

Certain basic facts were before the district court. The case involved exercise of control over three of America's largest corporations—General Motors, ranking first among domestic manufacturing companies; the Du Pont Company, the largest domestic producer of chemicals and explosives; and U. S. Rubber, the ranking producer of tires, tubes, and various other rubber products. These corporate defendants have their principal offices in different cities, each is "found" and

"transacts business" in the Northern District of Illinois,* and the illegal conduct charged in the complaint is not localized. The district court's opinion on the motion to transfer summarizes the charges made in the complaint as follows:

> Briefly, the violations charged against the du Pont interests are (1) the creation in 1915 by members of the du Pont family of Christiana Securities and Delaware Realty as personal holding companies for the sole purpose of perpetuating family control over the du Pont Company and its policies; causing the du Pont Company to acquire control of General Motors and United States Rubber; (2) agreeing to enhance the size, power and market control of du Pont Company, General Motors and United States Rubber at the expense of competitors; and (3) agreeing to utilize control of the du Pont Company, General Motors and United States Rubber in such a way as to eliminate competition among themselves.

The district court said that it was self-evident that at whatever place the case might be tried, "some of the parties will be inconvenienced." It

---

* See Section 12 of the Clayton Act, 15 U. S. C. 22, providing that an action under the antitrust laws against a corporation may be brought not only in the judicial district of which it is an inhabitant, but also in any district in which "it may be found or transacts business." Section 1404 (a) "does not limit or otherwise modify" the choice thereby given the plaintiff as to the district in which to bring suit. *Ex parte Collett*, 337 U. S. 55, 60.

POOR COPY

BLEED THROUGH

said: "To attempt to resolve the niceties involved in balancing the relative convenience and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball." The court concluded that on the "over-all picture presented" transfer of the action to the District of Delaware "would probably cause as much inconvenience to some of the parties and their witnesses as it would convenience others, and a transfer would not be in the interest of justice."

General Motors has its administrative and executive offices in Detroit, Michigan, and New York City. Detroit is the center of its manufacturing and merchandising activities. The main offices of the Du Pont Company and of U. S. Rubber are respectively located in Wilmington, Delaware, and New York City. The other two corporate defendants, Christiana Securities and Delaware Realty have their headquarters and files at Wilmington, but the general files of Christiana Securities, the more important company, are not extensive.[7]

The district court, in ruling upon the question whether Wilmington had been shown to be a more convenient forum than Chicago, appears to have given some weight to the fact that Chicago

[7] They are contained in approximately six standard file drawers. Members of the Du Pont family own the stock of Christiana Securities and Delaware Realty, which companies, in turn, hold stock of the Du Pont Company.

is nearer and more accessible to Detroit than Wilmington. There was ample justification for such consideration in view of the fact that the complaint deals, in major part, with activities of General Motors or its past or present officers. The specific allegations of the complaint are found in paragraphs 32 to 134, inclusive.[8] Of these 112 paragraphs, 86, or 77%, are concerned with the relations between General Motors and the Du Pont Company or U. S. Rubber.[9] In argument on the motion to transfer, counsel for the United States described General Motors as constituting "in many ways the primary defendant."

Institution of the suit at Chicago involved no element of "shopping" for a place of trial which might put the defendants at a disadvantage.[10] The United States, when it chose Chicago as a central point having good connections by rail and air with almost all parts of the country, took cognizance of the possible objections based on in-

[8] Paragraphs 1–31 name the defendants, describe the trade and commerce involved, give the history of the Du Pont Company prior to 1915 (when defendants' conspiracy is alleged to have begun), and set forth in general terms the offenses charged. Paragraph 134 alleges the effects of the conspiracy.

[9] The 86 paragraphs referred to are 38 through 111 and 122 through 133.

[10] A fundamental element of the doctrine of *forum non conveniens* is that "the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508. See *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549, 560.

POOR COPY

BLEED THROUGH

convenience which one or more of the defendants might assert if suit were instituted at the headquarters of a particular defendant, i. e., Detroit, New York City, or Wilmington.

Under Section 1404 (a), "the convenience of parties" means the convenience of all parties to the action, including the plaintiff. The district court properly did not ignore that trial in Chicago served the convenience of the plaintiff. The investigation which led to the filing of the action was conducted by attorneys attached to the Chicago office of the Antitrust Division. They conducted the grand jury investigation in Chicago through which the plaintiff obtained, by means of subpoenas *duces tecum,* the documents which are the foundation for the allegations of its complaint.[11] It is also of some significance that, of the eleven witnesses who appeared before the grand jury and testified in response to subpoenas *ad testificandum,* two resided in Illinois, five in Michigan, one in New Jersey, one in New York City, one in Georgia, and one in Delaware.

The district court correctly said: "The choice of venue is to be determined by a preponderance of the facts and the burden is on the moving party." The present appellants plainly did not sustain the burden of proof. As we indicate below, the allegations with respect to convenience

[11] Most of the documents produced by the defendants in response to such subpoenas were in the form of photostats, with the originals being retained by the defendants.

in the affidavits which they filed in support of the motion to transfer are, to a high degree, general, indefinite, and inconclusive.

The affidavit on behalf of the Du Pont Company avers that the "great bulk" of the records essential to its defense are maintained in Wilmington; that if the cause is tried in Chicago it would be necessary to segregate and transport to that city the documents which counsel deems pertinent to defense of the cause, and the "split files" thereby resulting would create "inconvenience to the Company and to the trial of the action"; that according to counsel's present conception of the defense, "it may be necessary to call upwards of fifty witnesses", "most" of whom reside in or near Wilmington; that certain prospective witnesses have executive responsibilities in the Du Pont Company, which might be interfered with by attendance at a trial in Chicago; that a number of the prospective witnesses are of an advanced age; and that it is the opinion of defense counsel that the trial will require "at the minimum several weeks."

The affidavit on behalf of General Motors avers that many of its records relating to matters covered by the allegations of the complaint are located in New York City; that many of its present or former officials, whom it will "probably be necessary" to call as witnesses, are located in New York City "or in the eastern part of the United States"; and that General Motors' de-

POOR COPY

BLEED THROUGH

fense will probably require examination of several members of the Du Pont family and various officials and records of the Du Pont Company located in or around Wilmington.

The affidavit on behalf of U. S. Rubber avers that many of its "principal executives and important personnel" will be required to attend the trial either as witnesses or in order to assist its counsel, and thus absent themselves from the company's principal place of business in New York City; that it is a much shorter trip from New York City to Wilmington than to Chicago; and that most of the "principal" witnesses upon whom U. S. Rubber intends to rely reside in or around New York City.

The affidavits filed by the appellants definitely identify as witnesses only the defendants Pierre S. du Pont, Lammot du Pont, and Irenee du Pont.

We submit that, under all the circumstances, it is clear that the district court did not overstep the wide discretionary authority vested in it in ruling on the issues of convenience of parties and witnesses and the interest of justice, issues to be determined by a balancing of necessarily indefinite factors.

PRAYER FOR DISMISSAL OR AFFIRMANCE

For the reasons stated, it is respectfully submitted that the appeal should be dismissed or that the decree of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

No. 774. E. I. Du Pont de Nemours & Co. et al. v. United States. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Reed is of the opinion probable jurisdiction should be noted. Mr. Justice Clark took no part in the consideration or decision of this case. *Gerhard A. Gesell, Paul H. Arthur, John M. Harlan* and

Aaron Finger for appellants. *Solicitor General Perlman* for the United States. Reported below: 87 F. Supp. 962.

POOR COPY

BLEED THROUGH